

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2005-0129, State of New Hampshire v. Felix Lopez, the court on February 22, 2006, issued the following order:**

Following a jury trial, the defendant, Felix Lopez, was convicted of armed robbery of William Miller and accomplice to armed robbery of a Windham store. On appeal, he contends that the trial court erred in denying his motion to suppress out-of-court and in-court identification testimony. His appeal challenges only Miller's identification. He argues that as a result of the unnecessarily suggestive show-up identification, Miller's testimony was so unreliable that its admission violated the Due Process Clause of the Fourteenth Amendment. We affirm.

When unnecessarily suggestive police identification procedures are used, the State must demonstrate by clear and convincing evidence, in light of the totality of the circumstances that the identification was nonetheless reliable, based upon observations uninfluenced by the suggestive procedures used by the police. State v. Guay, 130 N.H. 413, 417 (1988). We will assume without deciding that the identification procedure was unnecessarily suggestive. We turn then to the issue of whether the identification was reliable, employing the totality of the circumstances test wherein we balance the prejudicial effect of an unnecessarily suggestive identification against five reliability factors. See State v. Howe, 129 N.H. 120, 123 (1987). The five factors are: (1) the witness's opportunity to view the defendant at the time of the crime; (2) the degree of the witness's attention; (3) the accuracy of the prior description given by the witness; (4) the witness's level of certainty; and (5) the length of time between the crime and the challenged identification. *Id.*

In this case, Miller saw the defendant prior to the robbery outside the store where he described the lighting as "great." During the robbery which took place minutes later, the defendant stood "right up against" him, took his wallet and held something that felt like a gun in his ribs. The trial court found that Miller had ample opportunity to view the defendant and that his level of attention was high. The trial court also found that Miller's previous description was incomplete given the brief time between the robbery and the challenged identification procedure and that Miller was certain about his identification. An adequate record exists to support the trial court's findings. *See id.* at 125. While Miller testified at trial that he had confused the descriptions of the two men in the store when he had spoken to the police after the robbery, the other factors support a finding of reliability. Although the defendant also cites other

aspects of Miller's trial testimony as providing further evidence to doubt the reliability of his identification testimony, the trial court had previously found that the short time between the robbery and the identification prevented Miller from providing a complete, detailed description.

The defendant argues that we should give little weight to the certainty that Miller attached to his identification. However, because his claim of error is made under the Federal Due Process Clause, we are bound by federal case law and consider that as one part of the reliability test. See Neil v. Biggers, 409 U.S. 188, 199-200 (1972) (setting forth reliability factors).

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,  
Clerk**